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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/825,989	04/05/2001	Jed W. Fahey	046585/0138	4463
22428	7590	10/06/2006	EXAMINER	
FOLEY AND LARDNER LLP			KRASS, FREDERICK F	
SUITE 500			ART UNIT	
3000 K STREET NW			PAPER NUMBER	
WASHINGTON, DC 20007			1614	

DATE MAILED: 10/06/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/825,989

Applicant(s)

FAHEY ET AL.

Examiner

Frederick Krass

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 November 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 48-63 and 65-71 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 48-57 is/are allowed.
- 6) ☒ Claim(s) 58-63 and 65-71 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application
- ☐ Other: _____

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Claim Informalities

Claim 60, first line, immediately after "is" there should be inserted – at ---

Previous Rejections

Unless specifically maintained infra, all previous rejections are withdrawn.

Because the new grounds of rejections which follow were not necessitated by Applicant's amendment, this action is NON-FINAL.

Nonstatutory (Obviousness-Type) Double Patenting Rejection

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 58-63 and 65-71 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 6-8 and 11-33 of U.S. Patent No. 6,177,122. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is obvious on its face that the methods of the instant claims will necessarily result in foods falling within the scope of the conflicting claims. Note that during prosecution of the patent restriction was required between 1) sprouts 2) foods 3) solvent extracts and 4) pills/tablets. See paper no. 9, dated 9/21/99. No restriction was made between food products and the methods used to make them. Accordingly, an obviousness-type double patenting rejection is appropriate in this instance.

Discussion: State of the Prior Art at Time of Filing

As previously argued by Applicant, the prior art of record actually teaches away from the instantly claimed methods for making foods. Specifically, Jones et al (USP 4,158,656) notes at column 3, lines 48-53 that glucosinolates and isothiocyanates should be removed prior to making any food products. Anjou et al (USP 4,083,836) discloses substantially the same.

Furthermore, the prior art of record also teaches away from harvesting vegetables up to and including the 2-leaf stage. See for instance Pusateri et al (USP 5,686,108) at column 2, lines 48-51, which notes that mature broccoli florets are preferable to other

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parts of the plant because of their higher nitrile content. Accordingly, no issue of obviousness-type double patenting is seen with regard to claims relating to methods of making food products in which selection of same is required in USP 5,698,567 and USP 5,725,895.

Allowable Subject Matter

Claims 48-57 are allowable as presently advised.

The prior art of record does not fairly suggest, teach or disclose extracting glucosinolates and isothiocyanates from plant tissue using a combination of DMSO, acetonitrile and DMF as recited instantly, as discussed in detail in Applicant's response.

Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frederick Krass whose telephone number is (571) 272-0580. The examiner can normally be reached on Monday-Friday from 9:30AM to 6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel can be reached at (571) 272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

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published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Frederick Krass
Primary Examiner
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